Public Prosecutor v Nasaruddin Daud & Anor

HIGH COURT (KUALA LUMPUR) — CRIMINAL TRIAL NO 45–09 OF 2002
HELILIAH J
14 DECEMBER 2004

Criminal Procedure — Police investigation — First information report — Absence of — Information leading to the police conducting an investigation leading to a trap — Whether contrary to Criminal Procedure Code s 107

Criminal Procedure — Search — Search list — Absence of — Defence suggestion that defendant carrying the bag was holding something else — Whether fatal to prosecution case

Evidence — Agent provocateur — Corroboration — Police officer a trap witness — Informer left scene — Dangerous Drugs Act 1952 s 40

The prosecution's case rested on the evidence of Chief Insp Haslah (SP9) and Constable Aziz (SP4). SP9 received a call from a civilian giving her information about ganja trafficking activity that would be carried out by two males. After a brief meeting between SP9 with an informer, SP4 was instructed by SP9 to act as an undercover for the purchase of ganja. On the appointed day, SP4 was introduced to two persons in front of a shop by the informer. The informer then left the scene. The evidence that followed centered around the purported negotiation to buy and sell '3 kilos of the daun'. SP4 demonstrated, inter alia, how he showed the money or 'flash roll' to OKT2 who then spoke to the person identified as Bob (OKT1). OKT1 then stood up and left the restaurant. Subsequently at the suggestion of OKT2, SP4 and OKT2 stood outside to await 'itu barang sampai'. After about 5 to 10 minutes, SP4 saw OKT1 approaching carrying with his right hand a plastic bag that was white in colour. Upon being shown the contents, there was a request from OKT2 for the money. SP4 then gave his signal. It was at that stage that SP9 appeared with the other police personnel and identified herself. OKT1 was apprehended still with the plastic bag in hand. OKT2 apparently was also detained by another member of the team who accompanied SP9. During the scuffle, OKT2 who had attempted to break away was apprehended by SP8 and another police personnel. OKT2 was brought to the spot where SP9 had already detained OKT1. After having administered the caution under s 37A of the Dangerous Drugs Act 1952, SP9 then took the bag (PI1) which was being held by OKT1 for examination and found as it were that PI1 contained the ganja.

Held:

(1) In the absence of first information report, the reason given by SP9 was not

A contrary to s 107 of the Criminal Procedure Code. This was not the report of an offence being committed but information leading to the police conducting an investigation leading to a trap. In *Khwaja Nazir Ahmad* AIR 1945 PC 18, it had been held that a first information report is not a condition precedent to the commencement of criminal investigations (see para 15).

B (2) In the present proceedings, the absence of the search list was not fatal as the defence at the prosecution stage had failed to cast doubts on the bona fide of the police party conducting the search. Defence counsel had merely suggested that OKT1 who was carrying the bag was holding something else. A scrutiny of the evidence of SP9 was that she had seen OKT1 carrying the bag. Therefore C what was challenged was what was seen and found (see para 20).

(3) SP4 was a trap witness or alternatively an agent provocateur. Section 40 of DDA 1952 stipulates that he was not to be unworthy of credit by reason only of having attempted to abet or abetted the offence (see para 34). The presumption that a person acts honestly applies as much in favour of a D police officer as of other persons and it is not a judicial approach to distrust and suspect him without good grounds (see *Raja Khima v State of Saurashtra* A 1956 SC 217). The evidence of SP9 afforded corroboration to the evidence of SP4. SP9 had seen herself the two persons who were subsequently identified as OKT1 and OKT2 after their arrests (see para 37).

E **[Bahasa Malaysia summary**

Kes pihak pendakwa adalah berdasarkan keterangan Ketua Inspektor Haslah (SP9) dan Konstabel Aziz (SP4). SP9 telah menerima satu panggilan daripada seorang awam yang memberi maklumat tentang kegiatan pengedaran dadah yang akan F dilaksanakan oleh dua lelaki. Selepas mesyuarat ringkas antara SP9 dan pemberi maklumat, SP4 telah diarahkan oleh SP9 untuk bertindak sebagai ejen pengintip untuk membeli ganja. Pada tarikh yang ditetapkan, SP4 telah diperkenalkan kepada dua orang di hadapan sebuah kedai oleh pemberi maklumat. Pemberi maklumat kemudian meninggalkan tempat kejadian. Keterangan seterusnya adalah berdasarkan G rundingan yang berlaku bagi tujuan membeli dan menjual '3 kilos of the daun'. SP4 telah menunjukkan, antara lain, bagaimana beliau menunjukkan wang atau 'flash roll' kepada OKT2 yang kemudiannya telah bercakap dengan seorang yang dikenali sebagai Bob (OKT1), OKT1 kemudian berdiri dan meninggalkan restoran itu. Berikutan itu, atas cadangan OKT2, SP4 dan OKT2 berdiri di luar untuk H menunggu 'itu barang sampai'. Selepas 5 hingga 10 minit SP4 melihat OKT1 datang membawa beg plastik putih dalam tangan kanannya. Selepas ditunjuk kandungannya, OKT2 meminta wang tersebut. SP4 kemudian memberikan isyaratnya. Pada masa ini SP9 muncul dengan pasukan polis lain dan memperkenalkan dirinya. OKT1 ditahan dengan beg plastik itu masih di tangannya. OKT2 juga telah ditahan oleh ahli lain pasukan itu yang mengiringi SP9. I Semasa pergelutan itu, OKT2 yang cuba melepaskan diri telah ditahan oleh SP8 dan seorang polis lain. OKT2 dibawa ke tempat di mana SP9 telahpun menahan OKT1. Selepas memberikan amaran di bawah s 37A Akta Dadah Berbahaya 1952, SP2 kemudian mengambil beg (PI1) yang dipegang oleh OKT1 untuk pemeriksaan dan mendapati PI1 mengandungi ganja.

Diputuskan:

(1) Dengan ketiadaan laporan maklumat pertama, alasan yang diberikan oleh SP9 tidak bertentangan dengan s 107 Kanun Acara Jenayah. Di sini bukanlah laporan satu kesalahan yang telah dilakukan tetapi maklumat yang membawa kepada pihak polis menjalankan siasatan yang merupakan satu perangkap. Dalam *Khwaja Nazir Ahmad* AIR 1945 PC 18, telah diputuskan bahawa laporan maklumat pertama bukan satu pra syarat dalam permulaan siasatan jenayah (lihat perenggan 15).

(2) Dalam prosiding semasa, ketiadaan senarai siasatan tidak memudaratkan kerana pembelaan di peringkat pendakwaan telah gagal menimbulkan keraguan terhadap pasukan polis yang secara bona fide mengendalikan siasatan itu. Peguam pembelaan hanya mencadangkan bahawa OKT1 yang membawa beg itu telah memegang benda lain. Setelah meneliti keterangan SP9, beliau sememangnya nampak OKT1 membawa beg tersebut. Oleh itu apa yang perlu dicabar adalah apa yang dilihat dan dijumpai (lihat perenggan 20).

(3) SP4 adalah seorang saksi perangkap atau alternatifnya seorang ejen provocateur. Seksyen 40 ADB 1952 menetapkan bahawa seseorang itu tidak patut tidak dipercayai hanya atas alasan telah mencuba untuk melakukan atau telah melakukan kesalahan (lihat perenggan 34). Andaian bahawa seseorang itu bertindak jujur terpakai untuk menyebelahi pihak polis dan juga sesiapa yang lain dan ia bukan satu pendekatan kehakiman untuk tidak mempercayai dan mensyaki seseorang itu atas alasan baik (lihat *Raja Khima v State of Saurashtra* A 1956 SC 217). Keterangan SP9 memberikan sokongan kebenaran keterangan SP4. SP9 sendiri telah melihat kedua-dua orang yang dikenalpasti sebagai OKT1 dan OKT2 selepas tangkapan mereka (lihat perenggan 37).]

Notes

For cases on corroboration, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 244–247.

For cases on first information report, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2606–2612.

For cases on search list, generally, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3041–3053.

Cases referred to

Alcontara a/l1 Ambross Anthony v PP [1996] 1 MLJ 209 (refd)
Chan Chwen King v PP [1962] MLJ 307 (refd)
Cheng Swee Tiang v PP [1964] MLJ 292 (refd)
Chong Soon Koy v PP [1977] 2 MLJ 78 (refd)
Dato Seri Anwar bin Ibrahim v PP [2000] 2 MLJ 486 (folld)
Khwaja Nazir Ahmad AIR 1945 PC 18 (folld)
Leong Hong Khie v PP and Tan Gong Wai v PP [1986] 2 MLJ 206 (distd)
Liew Kaling & Ors v PP [1960] MLJ 311 (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65 (refd)
Mat v PP [1963] MLJ 263 (refd)
(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng and (4) Ng Ah Kiat v PP [1987] 2 MLJ 336 (refd)

A *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560 (refd)
PP v Abdul Razak bin Johari [1991] 1 MLJ 105 (refd)
PP v Chin Hock Aun [1989] 1 MLJ 509 (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1 (folld)
PP v Gan Ah Bee [1975] 2 MLJ 106 (refd)
B *Raja Khima v State of Saurashtra* A 1956 SC 217 (folld)
San Soo Ha v PP [1968] 1 MLJ 34 (refd)
Subramaniam v PP [1956] 1 WLR 965 (refd)
Tega Singh & Anor v PP [1950] MLJ 71 (refd)
Ti Chuee Hiang v PP [1995] 2 MLJ 433 (distd)

C **Legislation referred to**
Criminal Procedure Code ss 64, 107
Dangerous Drugs Act 1952 ss 2, 37A, 39B(l)(a), 39B(2), 40(1), (2), (3)
Dangerous Drugs Ordinance 1952
Evidence Act 1950 ss 27, 32

D

Appeal from: Arrest Case No A81–24 of 2001 (High Court, Kuala Lumpur)

Wan Shaharuddin bin Wan Ladin (Mohd Dusiki bin Mokhtar with him) (Deputy Public Prosecutor) for the prosecution.
E *S Selvam (Selvam Shanmugam & Partners) for the first accused.*
RS Seelan (RS Seelan Parames & Co) for the second accused.

Heliliah J:

F

[1] The charge:

> Bahawa kamu bersama-sama pada 15 Jun 2001 jam lebih kurang 8.30 malam di kawasan Jalan Raja Alang dalam daerah Dang Wangi dalam Bandaraya Kuala Lumpur Wilayah Persekutuan, dalam meneruskan niat bersama kamu semua telah didapati mengedar dadah
G berbahaya iaitu 2 ketulan mampat dadah ganja dan 200 paket plastik dadah ganja yang beratnya 2300g (kasar), oleh yang demikian kamu bersama-sama telah melakukan kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 39B(2) Akta yang sama dan dibacakan bersama s 34 Kanun Keseksaan.

H **[2]** The prosecution's case rested on the evidence of Chief Insp Haslah (SP9) and Constable Aziz (SP4). SP4 at the material time being a corporal with the intelligence unit of the Narcotics Division of Police Contingent Kuala Lumpur was on 15 June 2001 on duty and received a call from SP9 also an officer from the same unit. He met SP9 at about 5.30pm when he received instructions that he would be an undercover
I agent in an operation involving the buying and selling of ganja in the area of Jalan Raja Alang where two male Acheh were involved. SP4 was instructed at the instance of SP9 to meet an informer to obtain certain information. The informer had earlier on met SP9 with some information. SP4 met the informer at about 6pm. The informer had received instructions from SP9 to touch base with certain 'targets'. According to the evidence of SP4 the informer did supply him certain general

description about a tall person and a shorter person. It was also evident that at that stage too the informer had contacted the 'targets' by using a cell-phone.

[3] Subsequently, SP4 contacted SP9 to confirm that he had been in touch with the informer. Upon informing SP9 that he had thus been in contact with the informer, SP4 was instructed by SP9 to meet up with her again at the contingent's headquarters at 6.30pm. The second discussion with SP9 pertained to the proposed buying and selling of the drugs that is the amount and the price. SP4 was to be given money for the planned 'purchase'. SP4 was instructed to request a quantity of 3kg of ganja at a price of RM1,000 per kilo. The purpose of supplying SP4 with the money was to ensure that the negotiation that was to take place with the 'targets' for the purchase of ganja would be genuine.

[4] SP4 was given RM3,000 as 'flash roll' that is the amount that was said to be shown to the 'targets'. SP4 also informed SP9 that he would be meeting with the two 'targets' at about 8 pm for the purpose of buying and selling the ganja. During the discussion with SP9, SP4 was also instructed as to the manner in which he was to give a certain signal to signify that he had seen the ganja that was to be sold.

[5] The evidence led by the SP9 was that she had received information while she was in her office on 15.6.2001 at the Jabatan Narkotik IPK, Kuala Lumpur. She received a call from someone (dari orang awam) giving her information about ganja trafficking activity that would be carried out by two males who were nationals of Acheh at the area of Jalan Raja Alang near Chow Kit. According to SP9 the informer was known to her. A meeting was arranged with the informer at an eating shop in Jalan Galloway Kuala Lumpur and instructions were to be given to the informer to contact the 'targets', as it was termed, and to inform the informer that there was an intended buyer for the ganja. After the brief meeting with the informer at about 5.15pm, SP9 then contacted SP4 and met him about 5.30pm at her office. SP4 received a briefing from SP9 and she instructed the former to act as an undercover for the purchase of the ganja.

[6] On the instructions of SP9, SP4 met the informer for about 10 minutes also at Jalan Galloway. At the meeting it was in evidence that the informer had used a cell phone to communicate with one of the targets. No name was specified with whom he had been in communication with then and neither was it stated in evidence in chief or during cross-examination whether the target received the call by mobile phone or otherwise.

[7] The evidence of SP9 and SP4 indicated that the purpose of the brief meeting between SP4 and the informer was to arrange an introduction between the SP4 and the targets. After the brief meeting with the informer SP4 was instructed to be at SP9's office at about 6.30pm, where SP4 and SP9 went into some details about the nature of sale and the price that was going to be offered. There was also a discussion on a general description of the 'targets'. Their names were mentioned that is 'Din' who allegedly was the taller one and 'Bob' a shorter person. SP4 also received instructions with regard to certain gestures that he had to carry out in the event that

A the ganja was actually displayed to him. The location for the drug dealing transaction that was to take place was identified as a 'minang' restaurant in the Jalan Raja Alang.

[8] SP9 also held a briefing session with a group of police personnel who were to accompany her and to be also present at the location that had been identified for the
B 'purchase' of the ganja at Jalan Raja Alang.

[9] Subsequently SP4, attired in civilian outfit, went to the location described as a 'minang' restaurant on his own bike No BGA 8700 and the informer arrived separately. About the same time SP9 and her team had also arrived and had stationed themselves around the vicinity. It was in the evidence of SP9 that she witnessed the
C arrival of both the SP4 and the informer and the events that transpired thereafter. At about 8pm, SP4 was introduced to two persons in front of a shop by the informer. At that time the taller one was then attired in white shirt 'berbaju putih' and was identified as 'Din' and Bob the shorter in a black shirt 'berbaju hitam'. The informer then left the scene. According to SP4 'Din' had informed him that 'Bob' was his
D friend. At the suggestion of 'Din' the three adjourned into the restaurant.

[10] The next stage of the evidence led by the prosecution pertained to the conversation that was stated by SP4 to have transpired between him with the taller of the two, Din (OKT2). The evidence of SP9 also revealed that at that time too SP9
E and a team of police personal had also arrived attired in civilian outfit and were already in the vicinity.

[11] The evidence that followed centered around the purported negotiation to buy and sell '3 kilos of the daun'. Details of the conversation or negotiations were led in evidence. SP4 demonstrated, inter alia, how he showed the money or 'flash roll' to
F OKT2 who then spoke to the person identified as Bob (OKT1) in a language that was not understood. OKT1 then stood up and left the restaurant. Subsequently at the suggestion of OKT2, SP4 and OKT2 stood outside to await 'itu barang sampai'. After about 5 to 10 minutes SP4 saw OKT1 approaching carrying with his right hand a plastic bag that was white in colour. Upon being shown the contents, there
G was a request from OKT2 for the money. SP4 then gave his signal, ie the stroking of the back of his head. It was at that stage that SP9 appeared with the other police personnel and identified herself. Both OKT2 and OKT1 tried to break free apparently to abscond. A scuffle followed and both OKT2 and SP9 sustained slight injuries. OKT1 was apprehended still with the plastic bag in hand. OKT2 apparently
H was also detained by another member of the team who accompanied SP9. During the scuffle, OKT2 who had attempted to break away was apprehended by SP8 and another police personnel. OKT2 was brought to the spot where SP9 had already detained OKT1. After having administered the caution under s 37A of the DDA 1952, SP9 then took the bag (PI1) which was being held by OKT1 for examination and found as it were that PI 1 contained the ganja.

I

[12] The evidence of the prosecution showed SP9 as the eye witness of the 'negotiations' that transpired at the minang restaurant. The evidence of SP9 was that she was sitting within the same premises at a distance where she was in a position to

observe the place where SP4, OKT1 and OKT2 were seated. It was in her evidence that she was within sight and her vision had not been obstructed at any one time.

PRIMA FACIE CASE

[13] At the end of the case for the prosecution, defence counsels had through various suggestion in cross-examination and submissions, challenged the evidence led by the prosecution. The issues were the following:

(i) The absence of a first information report

[14] Counsel for the defence relied on *Public Prosecutor v Abdul Razak bin Johari* [1991] 1 MLJ 105. In that case however, the evidence led against the accused depended primarily on the evidence of a police witness who was also the complainant. It was therefore held that the report made by him as the arresting officer and the first information report purported to be made by him should have been tendered. The accused in that case was arrested while he was on his way home and was said to have been behaving suspiciously. The total reliance on this case was as though a first information report has to be tendered each time the prosecution unfolds the narrative part of its case was found to be misleading. What was decided in that case was that the failure to produce the first information report in that case amounted to a serious omission, in the present case SP9 the arresting officer who led the team of police personnel received information from someone whom she was said to have known, that is an informer. The role of the informer is also to be dealt with as another aspect of the defence counsel's submission. SP9 had stated that she had not reduced any information into writing. The reason given was that, 'Saya tidak pasti laporan maklumat dan perlu membuat siasatan. Lazimnya tidak semestinya membuat first information report'.

[15] The reason given by SP9 was not contrary to s 107 of the Criminal Procedure Code. This was here not the report of an offence being committed but information leading to the police conducting an investigation leading to a trap. In *Khwaja Nazir Ahmad* AIR 1945 PC 18, it has been held that a first information report is not a condition precedent to the commencement of criminal investigations. The Court of Appeal in*Dato Seri Anwar bin Ibrahim v Public Prosecutor* [2002] MLJ 486 has affirmed the decision in *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1. The relevant passage in this latter case is reproduced as follows:

> Furthermore, the section does not say that there can be no investigation without a report. It has been held by the Privy Council that the receipt and recording of a report is not a condition precedent to the setting in motion of a criminal investigation and that there is no reason why the police, if in possession through their own knowledge or by means of credible though informal intelligence which genuinely leads them to the belief that a cognizable offence has been committed, should not of their own motion undertake an investigation into the truth of the matters alleged (see *Emperor v Kkwaja Nazir Ahmed* AIR 1945 PC 18). It has also been held that a police report is not a condition precedent for the commencement

of a criminal prosecution (see *Apsen Joseph v State of Kerala* AIR 1973 SC 1, *Herchun Singh & Ors v PP* [1969] 2 MLJ 209). I also refer to *PP v Foong Chee Cheong* [1970] 1 MLJ 97 where Gill J (as he then was) said at pp 97-98:

> …. However important a document a first information report is, it can never be treated as a piece of substantive evidence and the fact that no first information report was made is not in itself a ground for throwing out a case. The powers of the police to investigate do not depend solely on Chapter XUI of the Criminal Procedure Code. The duties of a police officer as set out in s 20 of the Police Act 1967 include apprehending all persons whom he is by law authorized to apprehend and these duties are amplified in s 23 of the Criminal Procedure Code. Most of these duties imply a power to investigate whether there has been an information under s 107 of the Criminal Procedure Code or not (see *Vellasamy v Rex* [1941] MLJ 233 at p 236).

The submission of counsel for the defence on this issue was therefore ruled out.

(ii) Absence of a search list

[16] With regard to the absence of a search list it was the case of the prosecution that OKT2 was actually still engaged in the negotiation for sale while OKT1 was holding the bag containing the ganja, when the police team closed in upon them after the signal was given by SP4. Section 64 of the Criminal Procedure Code states as follows:

> A list of all things seized in the course of a search made *under this Chapter* and *of the places in which* they *are respectively found* shall be prepared by the officer or other person making the search and signed by him. (Emphasis added.)

[17] The bag containing the drugs were not found in a place but on a person and the search of the two OKT did not result in any other item being found. Counsel for the defence had argued that the failure of the prosecution to adduce in evidence a search list was fatal to the case for the prosecution. The Criminal Procedure Code was already in force before the Dangerous Drugs Ordinance 1952 (the predecessor of the Act) was promulgated. The Ordinance itself did not incorporate anything similar to Chapter VI of the Criminal Procedure Code. This is an instance where the legislative has made a special Act dealing with particular offences including, inter alia, drug trafficking. This therefore falls within the category of a special Act made after the general one and could therefore fall within the maxim generalia specialibus non derogant that is when the special Act was made it must be assumed that the Legilsative had in mind its own general Act when it made the special one and therefore the special one is an exception to the general one.

[18] In any case the position of the absence of a search list had been judicially considered in *San Soo Ha v Public Prosecutor* [1968] 1 MLJ 34. The appellant had appealed inter alia on the ground that a search list is required by s 64 was not prepared by the officer who conducted the search Raja Azlan Shah (as His Highness then was) in dismissing the appeal held, inter alia:

> The third ground of appeal is that the provisions of s 64 of the Criminal Procedure Code had not been complied with. In my view, the provisions of the section are to be strictly

followed to the extent it is possible to ensure that the incriminating articles obtained as a result of the search were recovered as alleged and leaves no room for doubt and to exclude the possibility of any concoction or malpractice of any kind. This section bears some resemblance to section 103 of the Indian Criminal Procedure Code which is more exhaustive than ours. Conviction or acquittal of an accused person invariably depends upon the credibility of witnesses as assessed by the trial court and never on the question whether a particular legal procedure has been complied with. The most that can be said about the failure to comply with the provision relating to search list is that it may cast doubt upon the bona fides of the parties conducting the search and accordingly afford ground for scrutiny; but if after close scrutiny the court arrives at the conclusion that the stolen articles were recovered from the possession of the accused person, it is obviously no defence to say that the evidence was obtained in an irregular manner. There is nothing in the law which makes such evidence inadmissible.

[19] Similarly, it was also noted that the learned judge in *Public Prosecutor v Chin Hock Aun* [1989] 1 MLJ 509 had similarly held as follows:

Defence counsel said there should have been a search list given to the accused. I do not think there is any requirement under the provisions of the Dangerous Drugs Act 1952 to provide a search list.

Section 65 of the Criminal Procedure Code reads:

> The occupant of the place searched, or some person on his behalf, shall in every instance be permitted to attend during the search, and a copy of the list prepared and signed under this section shall be delivered to such occupant or person at his request.

The requirement for the search list to be signed does not appear under s 65 itself but appears under preceding s 64 and I believe ss 64 and 65 were adapted from sub-s (2) and (3) of s 103 of the Indian Criminal Procedure Code and in the process a drafting error crept into our s 65; the word 'under this section' should really read 'under section 64'.

Now, s 64 requires a list of all things seized under 'this Chapter' (ie Cap VI of the Criminal Procedure Code) and of the places in which they are respectively found to be prepared by the officer or other person making the search and signed by him.

It will be noted that the search list is in respect of things seized under Cap VI of the Criminal Procedure Code. Chapter VI deals, inter alia, with the procedure in regard to the production of documents or other things for the purposes of any investigation, inquiry, trial or other proceeding (s 51), in regard to the production of postal articles (s 52), in regard to search warrants (s 54), in regard to warrants authorizing search for evidence of offences (s 56), in regard to search for persons wrongfully confined (s 58), in regard to search without warrant for stolen property (s 62), in regard to search warrant for counterfeit coins or currency and things connected therewith (s 62A and 62B), and in regard to summary search for stolen property under the written authority of the chief police officer (s 63).

There is no provision in Cap VI for the sort of seizure done in this case. In this case the seizure was made without a search warrant under the provisions of the Dangerous Drugs Act 1952. The general provisions for seizure with or without search warrants are contained in s 27 of the Act and there is nothing in s 27 or any other section requiring that a search list be made of goods seized after a search save for s 30(3). Section 30(3) states that when any conveyance is seized under s 30, the seizing officer shall forthwith give notice in writing of such seizure and the grounds thereof to the owner of such conveyance but even then no such notice is required to be given where the seizure is made in the presence of the offender or

A the owner or his agents. Thus to my mind there is no legal obligation on the part of the raiding party in this case to prepare and deliver a search list under the terms of ss 64 and 65 of the Criminal Procedure Code.

Even if I am wrong on the non-applicability of the said ss 64 and 65 to the present case, I am mindful of the case of *San Soon Ha v PP* and I am satisfied that no doubt has been B cast on the bona fides of the police party conducting the raid at the hotel room. And no reasonable doubt has been created in my mind that, as the prosecution's case shows, there was no other bag apart from the briefcase seized in the room.

C **[20]** In the present proceedings, the absence of the search list was not fatal as the defence at the prosecution stage had failed to cast doubts on the bona fide of the police party conducting the search. Defence counsel had merely suggested that OKT1 who was carrying the bag was holding something else. A scrutiny of the evidence of SP9 was that she had seen OKT1 carrying the bag. Therefore, what was challenged was what was seen and found. Counsel however had also failed to D establish the alleged ulterior motive the police had in wanting to frame OKT1 as SP9 had given an eyewitness account.

[21] Reference was also made by counsel for the defence to the finding made by the Federal Court in the case of *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] E 1 MLJ 209. In the present case, there was no suggestion that there was a search list prepared. What was suggested during cross-examination was that OKT1 was carrying a shoulder bag and this allegation was found to be against was the evidence of the two police witnesses. *Alcontara*'s case has no direct relevance on the facts of the present case.

F *(iii) Non applicability of s 27 of the Evidence Act 1950*

[22] This related specifically to the applicability of s 27 of the Evidence Act 1950. The scope of s 27 was examined in the case of *Chong Soon Koy v Public Prosecutor* G [1977] 2 MLJ 78. On the facts of the present case, it was found that the contention of the Deputy Public Prosecutor that s 27 was not applicable was upheld. The conversation that SP4 had referred to in his oral evidence placed in its proper context was not information leading to the discovery of a fact which in this case was the handling of the drugs by OKTI. At the tune the drugs were being carried in PI1 H neither OKTI and OKT2 could be said to be in custody. There was also no suggestion that the conversation that transpired was not voluntarily made. The evidence of SP4 was to be given a different level of scrutiny as he was an agent provocateur, (iv) Credibility of prosecution witness. It was found that the underlying challenge to the prosecution's case was the credibility of the two principal prosecution witnesses that is SP4 and SP9. The court was really invited to disbelieve every iota I of the evidence of the prosecution.

[23] The first issue to be addressed before discussing the evidence of SP4 and SP9 was the role of the informer. The informer was in touch with SP9 and as stated in evidence to be known by her. SP4 was also in contact with the informer and both

OKT1 and OKT2 were introduced by the informer to SP4. These facts had to be viewed in the light of s 40(1) of the DDA 1952 [Act 234] which provision was also in existence under the Ordinance 1952.

[24] No documents were adduced in evidence pertaining to any statement which could have enabled the court to invoke s 40(2) and (3) of the DDA 1952.

[25] Counsel for the defence relied on the Federal Court decision in *Leong Hong Khie v PP* and *Tan Gong Wai v Public Prosecutor* [1986] 2 MLJ 206 and *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433 to invite the court to discount whatever information supplied by the informer in this case as hearsay based on the former decision and secondly that the informer's role in the present case was interwoven with the evidence such that the informer had assumed the mantle of an agent provocateur and hence had lost the protection under s 40 of the DDA 1952. The facts of *Leong* and *Tan*'s case were examined. In that case, the informers were indeed involved in almost the entire operation. The informers informed the prosecution witness that there would be a transaction involving 8 Ibs of heroin and the respective role that the informer themselves would play. A meeting was arranged and a place identified. At the identified place, the informers were also seen in a car with the accused (the appellant). There was therefore active participation by the informers and the case was decided principally on the question of the hearsay statements of the informers which were ruled inadmissible based on s 32 of the Evidence Act 1950. As mentioned above, SP9 herself had stated she knew the informer. No reference number of the informer was mentioned. The informer did communicate with the 'targets' but no names were mentioned. When he was in the course of communicating the exact nature of the transaction that was to take place was also not stated.

[26] It had to be noted that in the second case cited, ie *Ti Chuee Hiang*'s case the informer was again an active participant. The informer in that case had also introduced the police witness to another person who had contacted the appellant. When the appellant arrived at the scene of a restaurant it was alleged that negotiations took place. The appellant then emerged from the restaurant together with another unknown male. Subsequently the appellant arrived in a car carrying a plastic bag which contained heroin and clothing. It was noted that *Ti Chuee Hiang*'s case was one which involved two other persons besides the informer. It was also noted that the Federal Court did embark on a discourse of persons essential to the unfolding of the prosecution's case and referred to several authorities from the Commonwealth pertaining to the calling of witnesses who should either be called as witnesses or alternatively offered to the defence as otherwise, it could cause a gap in the prosecution.

[27] It was found that the circumstances in the two mentioned cases could be distinguished. No doubt it was mentioned that the informer was the source leading to the introduction of SP4 to OKT1 and OKT2. In the present case, SP4 was the agent provocateur. There were discussions between SP4 and SP9 before SP4 met the two accused persons but the informer did not participate in the discussions. The question of how much money was to be paid, to whom and from whom was not stated was a conversation between SP4 and SP9. The informer left the scene after the

introduction and hence there was no necessity to apply the parity of judicial reasoning in the two Federal Court decision. In any case, both these decisions had not embarked on any discussion concerning the application of s 40 of the DDA 1952.

[28] The suggestion that the prosecution witness SP4 had presented a phoney or conjured version of the negotiation necessitated the court to visit the observation of Spenser Wilkinson J in *Tega Singh & Anor v Public Prosecutor* [1950] MLJ 71 at p 74:

> Sir Roland stated that he could find no reference to agents provocateurs in English text books and suggested that the reason for this was that the evidence of such persons was never used in England. I find, however, the following passage in *Roscoe 's Criminal Evidence* (15th Ed) p 156:
>
> > Agents provocateurs, spies, informers, detectives & etc., are not accomplices. Such persons employed in entrapping criminals 'are entirely distinguished in fact and in principle from accomplices', per Maule, J., Mullins, 3 Cox C.C. 526: spy on Chartists, 1848; 'and I do not see that a person so employed deserves to be blamed if he instigates offences no further than by pretending to concur wit the perpetrators.' Followed in Bicldey 2 Cr. A.R. 63; 73 J.P. 239; 63 S J. 402,1909; woman police spy buy noxious drug.
>
> The following passage also appears in *Phipson on Evidence* (8th Ed) p 478:
>
> > The rule requiring the corroboration of accomplices does not apply to two classes of accomplices: (a) Informers, ie persons who have joined in, or even provoked, the crime as police-spies (*R v Bicldey* 73 JP 239; or the police, who have assented thereto, *R v Heuser* 6 Cr App R 76);
>
> The headnote to the case of *Rex v Bickley* referred to in the above extracts reads as follows:
>
> > The evidence of a police spy or *agent provocateur* is not that of an accomplice and does not require corroboration.
>
> It appears from the extract above quoted that the learned author of *Roscoe's Criminal Evidence* classed agents provocateur in the same category as spies, informers and detectives. I have no doubt that there may be witnesses in any of these categories who may be wholly unworthy of credit but in my view the credit of any such witness depends upon the facts of each particular case and not upon the particular label which can be attached to him. in the present case the police witnesses were both detective corporals who were carrying out the instructions given to them. There is nothing disreputable about them. The worst that might be said about them as witnesses is they might naturally wish their efforts in carrying out their instructions to be successful and they might, therefore, be expected to have a strong bias in favour of the prosecution case. But the learned President has said this about them in his grounds of judgement:
>
> > I take this opportunity of reaffirming how impressed I was with the witnesses called for the prosecution. It seemed to me that there was nothing in their manner from which it could be inferred that they had in any way been wrongfully coached, but on the contrary they were honestly trying to tell what they had seen and heard; where they didn't know they didn't hesitate to say so. It was this feature about them which prompted me to say in my judgment that even if they had been uncorroborated accomplices I should have had no hesitation in acting on their testimony after careful warning.

The President's view of the evidence of the witnesses in question is supported by the record. These three witnesses did not each tell exactly the same story but each gave his version of what he saw and heard from his own particular point of view and I can detect no trace of any exaggeration or of attempts to improve the case. I am not prepared to hold that the evidence of these witnesses is not acceptable simply because the learned President has described them as having adopted the role of 'at the most of agents provocateurs'. I think the true answer to this part of the argument on behalf of the appellants is contained in the following passage from the judgment of Lord Alverstone CJ in *Rex v Mortimer*:

> I do not like the police traps any more than does anybody else; but at the same time there are some offences the commission of which cannot be found out in any other ways, and unlawful acts done in sequence of the trap are none the less unlawful.

In support of the contention that these witnesses were actually accomplices Sir Roland Braddell relied on the Indian cases of *Md Usuf Khan v Emperor* in *re Lakshminavayana Aiyer* and *Queen Empress v Javescharam*. In the last of these cases, the court held the witness in question to be an accomplice but with some doubt and in the former two cases the facts did not show the witnesses in question to be entirely free from some participation in the criminal design. I think the law is correctly stated in the case of *Emperor v Chaturbhuj Sahu* where the head-note reads as follows:

> A person who makes himself an agent for the prosecution with the purpose of discovering and disclosing the commission of an offence, either before associating with wrong-doers or before the actual perpetration of the offence, is not an accomplice but a spy, detective or decoy whose evidence does not require corroboration, though the weight to be attached to it depends on the character of each individual witness in each case. But a person who is associated with an offence with a criminal design, and extends no aid to the prosecution till after its commission is an accomplice requiring corroboration.

In the judgment in this case the following passage appears to me to be of practical value in distinguishing between accomplice and spy:

> It may sometimes be difficult to draw the line of discrimination between an accomplice and a pretended confederate, such as a detective, spy or decoy; but we think, that the line may be drawn in this way: If the witness has made himself an agent for the prosecution, before associating with the wrong-doers or before the actual perpetration of the offence, he is not an accomplice; but he may be an accomplice if he extends no aid to the prosecution until after the offence has been committed.

[29] The Supreme Court in *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336 had dwelt on a similar issue. The facts in *Namasiyiam*'s case had similarities with the facts in the present proceedings in that one of the witnesses was also introduced to the appellants through an informer. A trap was laid by the police together with an American agent of the Drug Enforcement Administration of the US. In addressing the position of the witness, Syed Agil Barakbah SCJ (as he then was) opined

> In the case of PW1, it was clear from the facts and surrounding circumstances that he was an agent provocateur. As such, he is protected by the provision of s 40A(1) and (2) of the Act in that he is not presumed to be unworthy of credit and his evidence relating to any attempt to abet or abetment of the offence if done for the purpose of securing evidence against an accused person, is admissible. Similarly, any statement made to him by an accused

A person shall be admissible at the trial. There is therefore no requirement for the evidence of an agent provocateur to be corroborated. That is not the case however with the informer, Francis. Evidence revealed that he took an active part from the beginning till the end of the episode by introducing PW1 to the first and second appellants, at times acting as PW1's spokesman, was present in all the meetings between PW1 and the appellants and lastly participated in the trap set up by PW1 and the police leading to the arrests of appellants and the seizure of the drugs. It appeared that his involvement in assisting PW1 in trapping the appellant was known to the police who throughout the trial called him as informer. In the circumstances of the case, he is not and cannot be termed as an informer within the meaning of s 40 of the Act and cannot claim any protection from disclosure of his name and address or any matter which might lead to his discovery under the Act. On the contrary, no disclosure was necessary because he was known to the appellants who appeared to trust him. Clearly, Francis was a particeps criminis, an accomplice in the true sense of the word. It was submitted that the absence of Francis at the trial would raise the presumption under s 114(g) of the Evidence Act unfavourable to the prosecution. Be that as it may, in the light of overwhelming prosecution evidence as stated earlier, we do not think that the presence of Francis, had he been available, would have made any difference.

[30] The role an 'informer' and 'agent provocateur' had similarly been discussed in *Pendakwa Raya v Mansur bin Abdul Rashid* [1996] 3 MLJ 560 at p 578. The relevant part of the judgment of Chong Siew Fai CJ (Sabah & Sarawak) as he then was found useful and are as follows

> The learned trial judge invoked adverse presumptions under s 114(g) of the Evidence Act 1950 for the non-calling of the informer, Cholar and the co-occupier of the premises, Amran by the prosecution as witnesses and for failing to offer them to the defence at the close of the prosecution case. His reason for doing so was based on his finding of fact that Cholar's role was not just an informer but was an active participant in the circumstances leading to the commission of the offence because he not only introduced PW9 to the second respondent but was also present during the subsequent transactions involving the one kati and one kilogramme of cannabis. Before us, it was submitted for the respondents that Cholar as an informer had turned into an agent provocateur. *Namasiyiam & Ors v PP* [1987] 2 MLJ 336, the judgment shows that Francis, the 'informer' (as the police called him throughout the trial) took an active part not only by introducing the agent provocateur to the offenders but also acted as the latter's spokesman and participated in the trap leading to the arrests of the offenders and the seizure of the drugs.

[31] As noted above the informer was in touch with both SP4 and SP9 but it could not be said that his role in the 'negotiations' for the sale and purchase of the ganja was active. Counsel was in effect challenging the use of intelligence report and the extent to which informers should or ought not to be involved. His challenge was therefore directed in substance towards the policy or framework of the legislation.

HEARSAY RULE

[32] SP4 who had been introduced to OKT1 and OKT2 gave evidence pertaining to the discussion that transpired between him and OKT2. OKT1 did not participate in the discussion but it was mentioned that OKT2 had said something to OKT1 in

a language which he did not comprehend. However what was particularly challenged was what SP4 had stated as to a particular part of his conversation with OKT2. An excerpt was as follows:

> Abang aku orang baru di sini. Aku datang dari Kuantan. Sekarang aku punya stok daun sudah kurang. Customer aku sedang tunggu aku di sana. Aku kena balik cepat. Aku mahu 3 kilo daun. Dulu aku pernah deal 1 kali di sini. Tapi itu hari aku sudah kena tipu. Aku harap abang jujur. Abang boleh bagi aku stok daun atau tidak. Berapa harga abang boleh kasi sama aku.

[33] According to SP4, the response of OKT2 was as follows

> Engkau jangan susah tentang itu daun, itu daun aku jual murah sama engkau, 1 kilo 1 ribu ringgit. Ini barang, barang baik. Tapi aku tak ada stock yang kau minta. Aku cuma ada 2 kilo dan 200 packet sahaja. Kau boleh cuba dulu. Kalau OK kau boleh jumpa aku untuk urusan lain. Sebanyak mana duit engkau boleh kasi tunjuk.

[34] Counsel for OKT2 in cross-examination had suggested that various parts of the oral testimony of SP4 were 'karut' and 'rekaan'. Briefly counsel's contention was that it was a frame-up, and that if the operation was successful SP4 would be receiving some form of payment. The alleged conversation had to be viewed in its totality. The question here was whether what was stated by SP4 was inherently credible. Counsel for OKT1 and OKT2 had adamantly objected to SP4 using his investigation diary to refresh his memory on the conversation. Yet the same counsel had argued that the diary had to be produced. This was ruled out. SP4 was a trap witness or alternatively an agent provocateur. Section 40 of DDA 1952 stipulates that he was not to be unworthy of credit by reason only of having attempted to abet or abetted the offence. *Sarkar on Evidence* (15th Ed) at p 145 states

> There is no rule of law that even if a witness is otherwise reliable and independent, his association in a pre-arranged raid makes him an accomplice or partisan witness, conviction is not untenable on the testimony of such witness merely (*Maha v SA* 1976 SC 49). The judge must warn himself of the danger of convicting on uncorroborated testimony of a trap witness.

[35] Throughout the cross-examination SP4 did remain consistent and his oral evidence was not uncorroborated. The scenario where SP4 was engaged in conversation with OKT1 and OKT2 was witnessed by SP9 and a team of police personnel. SP9 was the officer leading the raid. There was no evidence of hostility that could taint the credibility of what SP4 had said with regard to the conversation.

[36] SP9 was found to be a reliable witness with past experience in organizing similar raids. In the circumstances of the case, SP9 had seen SP4 sitting down and holding the discussion that was said to have taken place. The alleged statements of OKT2 could not be held to be a confession and was also admissible in accordance with s 37A of the DDA 1952.

[37] In *Raja Khima v State of Saurashtra* A 1956 SC 217, it has been held by Venkatarama Ayyar J that the presumption that a person acts honestly applies as

much in favour of a police officer as of other persons and it is not a judicial approach to distrust and suspect him without *good grounds therefore*. The evidence of SP9 afforded corroboration to the evidence of SP4. SP9 had seen herself the two persons who were subsequently identified as OKT1 and OKT2 after their arrests. SP9 was an eyewitness of the scenario where SP4 was conducting the negotiation.

[38] The argument of counsel for the accused that the evidence of SP4 relating to the conversation that took place between him and OKT2 was tantamount to hearsay and was therefore fatal to the prosecution's case. This argument was examined. In this case SP4 was stating something that was said by OKT2 who was present in Court. SP4 was not referring to what another person told him about what OKT2 said. It was relevant here as to what OKT2 had said. There was also here the object of proving what OKT2 had asserted about the negotiation as it was relevant in establishing his conduct in response to SP4 when SP4 embarked on his offer to purchase the ganja. What is in issue is what SP4 heard as to what OKT2 had said. This was therefore a situation where a statement was made by OKT2 and heard by SP4 upon which certain other action or conduct ensued. It was therefore not hearsay in the strict sense.

[39] The case of *Subramaniam v Public Prosecutor* [1956] 1 WLR 965 could be discussed in this context. The facts is stated

> The appellant was found in a wounded condition in the Rengam District in the State of Johore by members of the security forces operating against terrorists. He was tried on a charge of being in possession of ammunition contrary to regulation 4(1) (b) of the Emergency Regulations, 1951, of the Federation of Malaya, and put forward the defence, inter alia, that he had been captured by terrorists and that at all material times he was acting under duress. He sought to give evidence, in describing his capture, of what the terrorists said to him, but the trial judge ruled that evidence of the conversation with the terrorists was not admissible unless they were called. The judge said that he could find no evidence of duress, and in the result the appellant was convicted of the offence charged and sentenced to death. On appeal: Held, allowing the appeal, that the judge was in error in ruling out peremptorily the evidence of conversation between the terrorists and the appellant.

[40] The Privy Council held, inter alia, at p 970:

> In ruling out peremptorily the evidence of conversation between the terrorists and the appellant the trial judge was in error. Evidence of a statement made to a witness by a person who is not himself called as witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The *fact that the statement was made, quite apart from the truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of. some other person in whose presence the statement was made*. In the case before their Lordships statements could have been made to the appellant by the terrorists, which, whether true or not, if they had been believed by the appellant, might reasonably have induced in him an apprehension of instant death if he failed to conform to their wishes. (Emphasis added.)

[41] However on this aspect of the hearsay rule it was not entirely the only instance that the issue had to be addressed. Both SP4 and SP9 had testified that two males Acheh were involved and this was alleged by the 'informer'. Strictly therefore hearsay evidence is inadmissible to prove a fact which is deposed on hearsay. The informer had not been called upon to testify and to be subject for cross-examination. The references made SP4 and SP9 about the male Acheh were not objected to at the time the evidence had been recorded and unfortunately had already been admitted and hence the prejudicial effect had to be duly addressed. Counsel had referred to *Alacontara*'s case in the context of the conversation between SP4 and OKT2 on the negotiation that was said by SP4 to have taken place.

[42] Nevertheless the same case had also discussed the effect of police witnesses referring to information which had been received from members of the public or informers as in this case and that information is related in oral evidence in court. In *Alacontara*'s case Edger Joseph as he then was) stated on this point

> The penultimate point which arose for consideration concerned the admission of certain irrelevant, inadmissible and gravely prejudicial evidence, to wit, that part of the testimony of ASP Abdul Wahab wherein he gave an account of the briefing he had given his men on the night before he had mounted the road block to stop and search the car driven by the appellant; more particularly, he said this, 'I informed them [his men] that information had been received that a certain Indian would be traveling in a blue Colt Gallant Mitsubishi WBE 2789 and transporting dadah, proceeding from kawasan Permatang Bendahari towards Pulau Pinang.' Now, this statement by ASP Abdul Wahab was clearly based on hearsay, was prejudicial to the appellant, and therefore, inadmissible. Although no objection had been raised to the admission of this admissible evidence, the judge was nevertheless under an automatic duty to stop it from being adduced for inadmissible evidence does not become admissible by reason of failure to object.

In *Vijayaratnam v PP* [1926] MLJ 106, M Hashim J had to consider a similar point, and went so far as to say (at p 106 col 2D):

> I think, if possible, the expression 'on information received' should not be used by police officers when giving evidence. It would appear to mean that somebody has given information, which may be hearsay, to the police and the police act on this information. In this particular case, the police witness went on to say that on arrival at the scene, he laid an ambush. This statement, read in conjunction with the expression 'on information received', would tend to indicate that the police had been told that an offence would be committed. In my opinion, this would, to say the least, cloud the issue when the trial commenced and it might to a certain degree prejudice the court against the appellant. To put it in another way, there was a probability that the court trying the appellant was, to a certain extent, influenced by the opening statement of the police witness. In my opinion, such a state of affairs should be avoided.

Whilst we agree with much of what M Hashim J said in that case, we consider that in appropriate circumstances, there is nothing objectionable in a law enforcement officer saying, by way of introduction that, 'acting on information received', he took certain steps in the investigation. However, when such testimony is given, care must be taken not to divulge the contents of the information, as happened in the present case, since this may well be open to the objection that it is hearsay and, in all probability, prejudicial to the accused. Moreover, we must mention that in trials for any offence under the Act, sub-ss (1) and (2) of s 40 provide for special rules of evidence relating to the protection of informers - but note the exception provided for under sub-s (3) of s 40.

A **[43]** According to the evidence of SP4 apart from the informer stating that there were two male Acheh involved, the names 'Bob' and 'Din' were mentioned but SP4 were not made to be acquainted with the two persons until they eventually met at the restaurant.

B **[44]** The prosecution's case in its totality had to be evaluated. What had to be considered here was that this was in substance an entrapment. There was direct evidence of the negotiated sales which were found to be relevant and admissible as explained above. There is no presumption that police witnesses are to be disbelieved. There was no suggestion that there was a case of mistaken identity. In cross-examination the evidence of SP4 was not in substance challenged. C SP9 herself had explained that whatever information that was disclosed by the informer was not reduced to writing as she had to be certain about the information. It was found that the case presented by the prosecution was not wholly on the basis that OKT1 and OKT2 were the 'male Acheh' referred to by the informer but that a trap was laid.

D

[45] There was evidence before the court of OKT2 negotiating with SP4 and the transaction would have been completed had SP9 not appeared on the scene to intercept. OKT1 was present throughout and this was witnessed by SP9. It was OKT1 who was in direct physical possession of the P11 which contained the drugs. E The conduct of OKT2 that he was in a position to 'sell' the ganja and effectively had the power to dispose of the ganja and was about to accept the money from SP4.

[46] In the case of *Public Prosecutor v Gan Ah Bee* [1975] 2 MLJ 106, the judgment of Ajaib Singh J (as he then was) included statements which are applicable in considering the evidence tendered by the prosecution and they are as follows F (at p 108):

> I shall now come to the main point in issue in this appeal. It has long been held as a matter of law that evidence obtained as a result of an illegal or unlawful search does not affect its admissibility provided that the evidence so obtained is otherwise relevant to the case that is being heard. This proposition applies in general to both civil and criminal cases. G In *Saminathan v Public Prosecutor* which was a case under the Betting Enactment - Aitken J held that the legality or illegality of a person's arrest does not concern the court which is trying him and, in respect of certain documents that were seized by the police during the illegal search of the appellant's room, that the court was only concerned with the relevance of the documents seized and not with the manner in which the police obtained possession of them. Buhagiar J in the case of *Public Prosecutor v Tan Keng Siew* and Thomson J (as he H then was) in the case of Wong Liang Nguk (f) v. Public Prosecutor have also expressed a similar view. As was stated by Lord Goddard in the Privy Council case of *Karuma v The Queen*:
>
> > the test to be applied in considering whether evidence is admissible is whether it is I relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained.

[47] Additionally, in the case of *Cheng Swee Tiang v Public Prosecutor* [1964] MLJ 292, a similar issue was addressed as follows (at p 292)

Two police officers on the instructions of a superior officer entered the appellant's shop which deals in textiles, provisions and cigarettes for the express purpose of entrapping the appellant into accepting their stakes in a 10,000 characters lottery.

On entering the shop one of the officers asked to buy sugar and, when told by the appellant that he was not selling sugar, asked whether he could buy some numbers in a lottery commonly referred to as the 10,000 characters lottery. As a result this officer purchased $3 worm in this lottery. He then left the shop, told his superior officer of what had taken place and the latter then raided the shop under the authority of a search warrant, seized certain articles and cash and arrested the appellant.

It is not in dispute that the senior police officer sent a subordinate into the shop to commit an offence for the purpose getting evidence against someone in that shop and in order that an offence by another person may be detected. Counsel for the appellant rightly concedes that evidence obtained in this manner, if relevant, was in law admissible (per Goddard CJ in *Kuruma v The Queen* at p 203).

Another proposition put forward by counsel for the appellant and which is not in dispute is that in every criminal case a judge has a discretion to disallow evidence, even if in law relevant and therefore admissible, if admissibility would operate unfair against and accused. (*Karuma v The Queen* and *Callis v Gunn*).

It is undisputed law therefore that while evidence unlawfully obtained is admissible if relevant, there is a judicial discretion to disallow such evidence, if its reception would operate unfairly against accused.

Counsel for the appellant however seeks to establish a further proposition namely that in the exercise of its discretion and as a matter of public policy the court will normally, though not necessarily, exclude evidence obtained by law enforcement officers by consciously unlawful means.

This is a proposition I find myself unable to accept. First, it is a proposition not supported by any authority which is binding on this court though there are dicta in some Scottish cases and in a dissenting judgment of Holmes J of the Supreme Court of the United States of America cited by counsel for the appellant which appear to lend some support to it.

Secondly, the use of the doctrine of public policy has consistently been frowned upon by the courts. Burrough J (quoting Hobart CJ) said of it in *Richardson v Mellish* 'Public policy is an unruly horse, and difficult to ride.' Parke B said of it in *Egerton v Brownlow* 'Public Policy is a vague and unsatisfactory term….; it is capable of being understood in different senses, it may, and does, in its ordinary sense, mean 'political expedience', or that which is best for the common good of the community; and in that sense there may be every variety of opinion, according to education, habits, talents, and dispositions of such person, who is to decide, whether an act is against public policy or not. To allow this to be a ground of judicial decision, would lead to the greatest uncertainty and confusion'. More recently Lord Atkin in *Fender v Mildmay* said of it '… the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable…'.

No evidence is before us that if evidence obtained by law enforcement officers by illegal means is generally admitted against an accused in a criminal case the harm to the public is substantially incontestable and there can be I think no question that from the standpoint of principle two important interests come into conflict when considering the question of admissibility of such evidence so obtained. On the one hand there is the interest of the individual to be protected from illegal invasions of his liberties by the authorities and on the other hand the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from the courts on any merely technical ground.

A It seems to me that it is sufficient merely to state these two conflicting interests to dispose of the question of public policy posed by counsel for the appellant and on my part to state 1 am not at all satisfied that purely on principle it is clear that the harm to the public is substantially incontestable if evidence to obtained is admitted.

While the courts have consitently and in no uncertain language criticized the use of agent B provocateurs, whether they be law enforcement officers or not, the courts have also consistently admitted evidence obtained by such persons provided its adrnissibility does not operate unfairly against an accused.

It seems to me, both on principle and authority, that no absolute rule can be formulated and the question is one depending on the circumstances of each particular case.

C

[48] The decision in the case of *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65at pp 81–82 had once again postulated the essence of a 'prima facie' case.

It therefore follows that there is only one exercise that a judge sitting alone under s 180 of the Code has to undertake at the close of the prosecution case. He must subject the D prosecution evidence to maximum evaluation and ask himself the question: If I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no prima facie case has been made out and the accused would be entitled to an acquittal.

E Support for the view we have expressed may be found in the case of *Murray v Director of Public Prosecutions* [1994] 1 WLR 1. That was a case of attempted murder and possession of a firearm with intent to endanger life which was tried before a judge sitting alone. Lord Slynn of Hadley there said (at p 11):

> The accused cannot be compelled to give evidence but he must risk the consequences if F he does not do so. Those consequences are not simply, as the defendant contends, that specific inferences may be drawn from specific facts. They include in a proper case the drawing of an inference that the accused is guilty of the events with which he is charged.
>
> This does not mean that the court can conclude simply because the accused does not give evidence that he is guilty. In the first place the prosecutor must establish a prima facie case - a case for him to answer, In the second place in determining whether the accused is G guilty the judge or jury can draw only 'such inferences from the refusal as appear proper.' As Lord Diplock said in *Haw Tua Tau v Public Prosecutor* [1982] AC 136, 153:
>
> > What inferences are proper to be drawn from an accused's refusal to give evidence depend upon the circumstances of the particular case, and is a question to be decided by applying ordinary common sense.
> >
> > H There must thus be some basis derived from the circumstances which justify the inference. If there is no prima facie case shown by the prosecution there is no case to answer. *Equally, if parts of the prosecution case had so little evidential value that they called for no answer, a failure to deal with those specific matters cannot justify an inference of guilt.*
> >
> > I On the other hand, if aspects of the evidence taken alone or in combination with other facts clearly call for an explanation which the accused ought to be in a position to give,

if an explanation exists, then a failure to give any explanation may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty.

(Emphasis added.)

[49] The ingredients of the offence was established on the basis of direct evidence which fulfilled the requirements of trafficking s 2 of the DDA 1952 in that OKT1 was carrying the drugs and together with OKT2 were in the course of giving the drugs to SP4. SP4 was in the course of handing over the money when he signaled to the police team that was in the immediate vicinity. OKT1 was very much in physical possession of the drugs. OKT2 was according to the evidence spear heading the transaction. He was the spokesman for the two and there was no suggestion whatsoever that he did not understand what the transaction was. The same could be said of OKT1 who stood up to fetch the bag of ganja.

[50] At the end of the prosecution's case it was also found that there was no gap in the movement of the ganja while being kept in police custody. Counsel for the defence was not able to introduce an iota of doubt in the evidence of the chemist who had conducted the tests in order to arrive at a conclusion of fact on the nature of the offending drugs.

[51] On the evidence as examined above and the law, it was found this was a case of entrapment in which there was direct evidence of OKT1 and OKT2 intending to sell ganja to SP4. Both OKT1 and OKT2 were found to be acting in concert. OKT1 could not be said to be in passive possession as he was 'carrying' for the purpose of delivery. It was found that the prosecution had established the ingredients of trafficking within the ambit of s 2 of the DDA 1950 without having to rely any presumption.

[52] Both OKT1 and OKT2 were called upon to enter their defence.

THE DEFENCE

[53] Both OKT1 and OKT2 elected to give evidence under oath. Each had its own narration of the facts disclosed by the prosecution. OKT1 contended that he was on his way home from work and passing through Jalan Raja Alang. His working hours were alleged to be between 8am to 5pm at a canteen and as he was going through he saw police giving chase to someone in front of him. The police who was said to be following the person being chased very closely suddenly apprehended him and in the scuffle suffered slight injuries.

[54] OKT2 on the other hand alleged that he had arrived in Malaysia on 10 June 2001 from his kampung which was alleged to be Ambon, Riau and alleged to be close to Acheh. He denied being an 'orang' Acheh and alleged that he left Ambon during

A some religious strife between followers of the religion of Islam and Christian, According to him the distance between Ambon and Acheh was equivalent to the distance between Penang and Kuala Lumpur.

[55] OKT2 also alleged that having arrived in Malaysia with RM10 he was
B compelled to stay in a surau while waiting for work which he alleged was being offered by a fisherman. He alleged that he was arrested while leaving the surau to look for food.

[56] These facts had to be evaluated against the prima facie case determined by the
C court. In that final analysis what has to be considered was whether there could be discerned any inherent probability in the evidence of OKT1 and OKT2 to cast a reasonable doubt in the case for the prosecution.

[57] It was not suggested during the course of the evidence in-chief or
D cross-examination that this was a case of mistaken identity. The gist of the defence was as follows:

(1) Both OKT1 and OKT2 did not know one another until after they were both apprehended. A version was also given that they were only acquainted after having been charged in a lower court for illegal entry;

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(2) Both did not know what they were arrested for;

(3) Both had no knowledge of the existence of the cannabis nor were they engaged in any transaction;

F (4) The arrest was a mistake; and

(5) OKT2 said he ran because being an illegal he was afraid of the police.

[58] SP9 was an eye witness to the 'transaction' that had transpired between SP4 and OKT2 which was a distance of about seven feet away. OKT1 despite being silent
G stood up when OKT2 said something to him in a language that was foreign to SP4. SP9 saw SP4 and OKT2 adjourning to the side of the road in the proximity of the saloon and subsequently OKT1 appeared with a bag in his hand.

[59] At the end of the case for the defence and before final submission, an
H application was made by counsel for OKT2 for a longer adjournment to enable counsel to do more 'research' as it was alleged that OKT1 and OKT2 did not know one another. Unfortunately, it turned out that this was actually a move to buy more time. The evidence of the OKT1 and OKT2 had therefore to be evaluated as against the prima facie case.

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[60] It was found that the defence generally was one of denial. The explanation given was simply directly opposed to the version of the prosecution. It may well be that OKT1 had to conceal where he was staying since he was an illegal immigrant. The court therefore had to countenance the suggestion that since they were illegals the police were using illegal means to frame two persons as scapegoats. *Mat v Public*

Prosecutor [1963] 29 MLJ 263 is the oft cited authority on the meaning of the burden of proof by the accused in cases where it is necessary for him to rebut the prosecution case against him.

[61] Reference is made to the case of *Chan Chwen King v Public Prosecutor* [1962] MLJ 307 where Thomson CJ (as he then was) ruled, inter alia, at p 308:

> In most criminal cases there is at some stage an onus of a sort upon the accused person. Once the prosecution produces evidence which if believed would support a conviction there is a tactical onus on the accused person either to produce evidence of his own or to point to something in the prosecution evidence that at the very lowest make the trier of fact less than sure of any conclusions he might otherwise be prepared to base upon the prosecution evidence. If he fails to discharge that tactical onus he will be convicted. That is very true.

To suggest, however, that evidence for the defence is to be regarded and evaluated in isolation and if it fails to come up to some standard proof is to be discarded is in our view to go beyond the authorities.

On that I do not think it is necessary to do more than quote the well-known passage from Lord Sankey's speech in the case of *Woolmington v The Director of Public Prosecutions*:

> Throughout the web of the English Criminal Law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.
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> …
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> When evidence of death and malice has been given (this is a question for the jury) the accused is entitled to show, by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted.

These observations, in our view, are as applicable to a case like the present where the defence was an alibi as they were to the case in which they were used where the defence was that the killing must have been either accidental or the result of provocation.

Much the same thing was said 20 years later by the Court of Appeal in the case of Murtagh and Kennedy. There it was said that the case was one where it had been essential for the Judge to make it clear to the jury what were three possible positions in which they might find themselves 'bearing in mind throughout that it was not for the accused to establish their innocence'. One of these positions was that if they

A accepted the explanation of the accused they must acquit. The second was that if that explanation 'left them in doubt they must acquit'. The third was that on the whole of the evidence they must be satisfied of the guilt of the accused.

In other words the test is not: 'is the defence evidence consistent with the truth?', whatever that may mean, but does it leave the jury in doubt as to the guilt of the
B accused person? If the answer to that question be 'yes' the prisoner is entitled to be acquitted.

Having made these observations the question then arises on their application to the present appeal. This was not a case in which the credibility of the prosecution witnesses was of major importance. The witnesses whose credibility had to be
C evaluated with one exception spoke to matters of somewhat minor importance. The real question in the case was not whether the witnesses were to be believed but whether *the various circumstances to which they spoke pointed irresistibly in the one direction and one prisoner*. (Emphasis added.)

D **[62]** An earlier case *Liew Kaling & Ors v Public Prosecutor* [1960] MLJ 311, discussed 'reasonable doubt' as follows

> The first of these passages is from the judgment of Denning J (as he then was) in the case of *Miller v Minister of Pensions* where His Lordship thus described the degree of proof required in criminal cases:
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> > That degree is well settled. It need not reach certainly, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it
> F is possible, but not in the least probable,' the case is proved beyond reasonable doubt, but nothing short of that will suffice.
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> The second passage is from the summing-up of Lord Hewart CJ in *Podmore*'s case where His Lordship used the phrase 'beyond reasonable doubt' and then went on to say (the passage is from the transcript):
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> > You will not, I am sure, allow yourselves to be bewildered or troubled by such a phrase. What is means is not some whimsical or fanciful doubt, which a person might conjure up for the purpose of creating a difficulty, but such a doubt as would govern a man's course of action in some private affair of moment of his own.

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[63] There was no burden emplaced on the defence to produce witnesses. But in response to various questions posed by the prosecution OKT2 also gave simple denials as to his connection with the ganja that was being carried by OKT1. Overall, the suggestion of defence was that:

I (i) With respect to OKT1, being an illegal who by his own evidence was supposed to be employed somewhere in Bangsar, he was 'framed' in an operation where the police use illegals to blame for trafficking.

(ii) With respect OKT2, since he was an illegal and taking shelter in a surau for three days it was untenable that he would be engaged in trafficking. The gist again was that illegal are swooped upon and 'picked' for purposes of being charged for trafficking. The crux of contention was also that the police and the enforcement agencies are arbitrary and untrustworthy. The entrapment was for a frame-up or also for taking money from the illegal immigrants. Also suggested was that informers are not to be trusted because their objective is to obtain payment.

[64] The inherent incredibility of the defence failed to rebut the prosecution's case. At the end of the defence, it was found that the prosecution had established a case beyond reasonable doubt and OKT1 and OKT2 were found guilty of the charge preferred against them.

[65] The plea in mitigation of OKT1 was for a lesser sentence. OKT2 implored for OKT1 to be released. The mandatory sentence was therefore imposed.

Order accordingly.

Reported by Sally Kee